



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 9, 2022

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BOARD DECISIONS

Appellant: Rommie Requena
Agency: Department of Homeland Security
Decision Number: [2022 MSPB 39](#)
Docket Number: DA-0752-16-0012-I-3
Issuance Date: December 6, 2022
Appeal Type: Election of Remedy

ELECTION OF REMEDY

The appellant appealed a notice suspending her for 30 days and changing her position from Chief Supervisory Customs and Border Protection Officer to Supervisory Customs and Border Protection Officer. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant made a binding election to pursue her claims before the Office of Special Counsel (OSC) and was therefore precluded from challenging the actions before the Board pursuant to the procedures set forth in 5 U.S.C. § 7701. The appellant filed a petition for review.

Holding: Because the appellant was a supervisor, the election of remedies provisions found at 5 U.S.C. § 7121(g) did not apply and the appellant is

permitted to challenge the 30-day suspension and change in her position before OSC and with the Board pursuant to the procedures set forth in 5 U.S.C. § 7701.

1. Pursuant to 5 U.S.C. § 7121(g), an employee subjected to an action appealable to the Board who alleges that the contested action was taken in reprisal for whistleblowing may elect to pursue a remedy through only one of the following remedial processes: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance filed under an applicable negotiated grievance procedure; or (3) a complaint seeking corrective action from OSC. Generally, whichever option the appellant selects first is a binding election.
2. Supervisors and management officials are excepted from the election of remedies provisions described in 5 U.S.C. § 7121(g).
3. The Board overruled several prior Board decisions to the extent they found that the election of remedies statute at 5 U.S.C. § 7121(g) is applicable to supervisors and management officials.
4. The Board remanded the appeal for further adjudication on the merits.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Mark Edenfield

Respondent: Department of Veterans Affairs

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2021-2001](#)

MSPB Docket No.: AT-1221-19-0440-W-2

Appeal Type: Individual Right of Action (IRA)

The petitioner is a staff anesthesiologist at an agency medical center. In 2016, the agency revised its policy for obtaining informed consent from patients for certain medical procedures. The petitioner sent an email to the agency's credentialing office alleging that the medical center policy change violated agency policy, in particular, provisions of the Veterans Health Administration Handbook. The appellant later reiterated his belief in a meeting with the Chief of Staff of his medical center. About 2 years later, a Market Pay Review Panel, which included the Chief of Staff, met to review the petitioner's salary and voted against a pay increase. The petitioner filed a complaint with the Office of Special Counsel (OSC) alleging that he had been retaliated against for making protected disclosures regarding his belief that the medical center was violating agency policy and its handbook. The administrative judge issued an initial decision, which became the final decision of the Board, denying

corrective action and finding that the appellant failed to prove that he made a protected disclosure pursuant to the Whistleblower Protection Act (WPA) because he did not have a reasonable belief that his disclosure constituted a violation of agency regulation or its handbook.

Holding: The court reversed and remanded for further proceedings, finding the petitioner made a protected disclosure because the handbook provision at issue was “ambiguous at best,” and both the agency’s and the appellant’s interpretations were reasonable.

1. The WPA protects disclosures made by Federal employees who reasonably believe that the disclosure evidences a violation of a law, rule, or regulation. To determine whether a belief is reasonable, the Board must determine whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the agency’s action violates a law, rule, or regulation.
2. In determining that the appellant did not have a reasonable belief that the agency was violating its handbook, the administrative judge held that a plain reading of the regulation did not support the petitioner’s belief. However, the court held that the provision was “ambiguous at best” and it noted that an employee’s belief that a violation occurred could still be reasonable even if it is wrong. Because it found that the provision at issue was ambiguous and that both the agency’s and the petitioner’s interpretations are reasonable, the Board erred in holding that the petitioner did not have a reasonable belief that he was making a protected disclosure.
3. The court further added that, when applying the test for what constitutes a reasonable belief, the Board must look to the information that would have been available to or ascertainable by a disinterested observer at the time they made the disclosure.

NONPRECEDENTIAL:

Parrish v. Department of Health & Human Services, No. [2022-1170](#) (Fed. Cir. Dec. 8, 2022). The court found that an arbitration decision, which affirmed the appellant’s removal from Federal service for unacceptable performance, was supported by substantial evidence and it therefore affirmed the decision.

Oram v. Merit Systems Protection Board, No. [2022-1545](#) (Fed. Cir. Dec. 8, 2022) (MSPB Docket No. DC-3330-22-0003-I-1). The court affirmed the Board’s decision, which denied corrective action in the

appellant's appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) because the underlying complaint to the Department of Labor was untimely filed. The court rejected the petitioner's argument that the 60-day time limit to file a VEOA complaint should run from the date he discovered the alleged violation, rather than the date on which the alleged violation occurred, finding that the statutory language unambiguously identified the trigger for the filing deadline as the date of the alleged violation. The court further found that the appellant failed to preserve his argument about fraud for review, and, in any event, there was no evidence that the agency fraudulently induced him to miss the filing deadline.

Jordan v. Merit Systems Protection Board, No. [2022-1986](#) (Fed. Cir. Dec. 8, 2022) (MSPB Docket No. CB-7121-22-0005-V-1). The court dismissed the petitioner's petition for review as untimely filed.

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